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June 16, 2008

The Honorable Charles Terreni  
Chief Clerk of the Commission  
Public Service Commission of South Carolina  
Post Office Drawer 11649  
Columbia, South Carolina 29211

Re: Agreement between BellSouth Telecommunications, Incorporated d/b/a  
AT&T South Carolina, Alltel Communications, Incorporated and Alltel  
Holding Corporate Services, Incorporated  
Docket No. 2000-130-C

Dear Mr. Terreni:

BellSouth Telecommunications Inc. d/b/a AT&T South Carolina ("AT&T South Carolina") encloses for filing AT&T South Carolina's Proposed Order in the above-captioned matter.

By copy of this letter, I am serving a copy of this Proposed Order on all parties of record as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

Enclosure  
cc: All Parties of Record  
713686

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

AGREEMENT BETWEEN )  
BELLSOUTH )  
TELECOMMUNICATIONS, )  
INCORPORATED D/B/A AT&T SOUTH )  
CAROLINA, ALLTEL )  
COMMUNICATIONS, )  
INCORPORATED AND ALLTEL )  
HOLDING CORPORATE SERVICES, )  
INCORPORATED )

Docket No. 2000-130-C

**AT&T SOUTH CAROLINA'S PROPOSED ORDER**

This matter comes before the Commission upon an Emergency Motion for Order Acknowledging Withdrawal of Amendment to Interconnection Agreement filed by BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina ("AT&T South Carolina"). On May 28, 2008, the Hearing Officer assigned to this docket issued a Directive granting the parties' Joint Procedural Motion. This Directive provides that the record in this matter consists of: the interconnection agreement between Alltel Communications, Inc. ("ACI") and AT&T South Carolina that originally became effective August 29, 2004; the verified direct testimony of AT&T South Carolina witness Randy J. Ham and the five (5) exhibits thereto filed April 24, 2008; and the affidavit of ACI witness Charles Cleary and the four (4) exhibits thereto filed May 1, 2008. The Directive scheduled oral arguments for June 10, 2008.

The Commission heard oral argument in this matter on June 10, 2008 at 10:30 a.m. in the Commission's hearing room. ACI was represented by Robert D. Coble and Stephen B. Rowell. AT&T South Carolina was represented by Patrick W. Turner. The Office of Regulatory Staff was represented by C. Lessie Hammonds. During the

argument, the Commission granted without objection AT&T South Carolina's request to take administrative notice of the pleadings, testimony, and Orders on file with the Commission in Docket No. 2005-399-C.<sup>1</sup> On June 16, 2008, AT&T South Carolina and ACI filed their respective Proposed Orders.

We have carefully reviewed the parties' submissions, the evidence of record, and the controlling law, and this Order sets forth our rulings in this matter.

## **I. BACKGROUND**

AT&T South Carolina and ACI are parties to an interconnection agreement that originally became effective August 29, 2004.<sup>2</sup> The interconnection agreement collectively addresses both the wireline services provided by ACI as a competitive local exchange carrier ("CLEC") and the wireless services provided by ACI as a wireless provider.<sup>3</sup> When the original interconnection agreement became effective, ACI was certificated to provide (and did provide) wireline services in South Carolina.<sup>4</sup>

By letter dated February 28, 2008, AT&T South Carolina and ACI submitted an amendment to the above-referenced agreement to the Commission pursuant to Section 252(e) of the Telecommunications Act of 1996.<sup>5</sup> The amendment extends the

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<sup>1</sup> Joint Application of Windstream South Carolina, Incorporated (f/k/a Alltel Holding Corporate Services, Incorporated (AHCSI)) and Alltel Communications, Incorporated (ACI) to Approve the Transfer of ACI's Authority to Provide Local Exchange Services to AHCSI, Grant AHCSI Certification to Provide Long Distance Services in South Carolina, and Approve the Transfer of Local Exchange and Long Distance Resale Customers from ACI to AHCSI.

<sup>2</sup> See Ham Verified Testimony at 2; Interconnection Agreement, General Terms and Condition at §2.1. AT&T South Carolina filed a CD containing this interconnection agreement on April 25, 2008. See Notice of Filing CD with Commission.

<sup>3</sup> See Ham Verified Testimony at pp. 2-3; Interconnection Agreement, General Terms and Conditions, "Whereas" Clauses.

<sup>4</sup> See Ham Verified Testimony at p. 3.

<sup>5</sup> See Ham Verified Testimony at p. 2; Exhibit RJH-1.

interconnection agreement for a period of three years,<sup>6</sup> and it provides that “EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT.”<sup>7</sup> As of the date the amendment was submitted to the Commission, ACI no longer was certificated to offer wireline services in South Carolina because its certificate to do so had been transferred to an affiliated entity.<sup>8</sup>

On April 24, 2008, AT&T South Carolina filed an Emergency Motion for Order Acknowledging Withdrawal of Amendment to Interconnection Agreement. AT&T South Carolina’s Emergency Motion, which is supported by verified testimony, states that at the time AT&T South Carolina signed the amendment, it mistakenly believed that ACI remained a certificated CLEC in South Carolina. AT&T South Carolina claims this mistaken belief was based on: prior statements by ACI that were inaccurate at the time they were made and that were not subsequently corrected by ACI; and ACI’s failure to comply with the notice provisions of Section 9.2 of the General Terms and Conditions of the interconnection agreement. AT&T argues that under these circumstances, it should be allowed to withdraw the amendment so that the parties would be in the position they had occupied prior to execution of the amendment.<sup>9</sup> ACI opposes AT&T South Carolina’s request to withdraw the amendment.

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<sup>6</sup> See *Id.*

<sup>7</sup> See Exhibit RJH-1 (emphasis in original).

<sup>8</sup> See Order Granting Expedited Review and Approving Application, *In Re: Joint Application of Alltel Holding Corporate Services, Incorporated (AHCSI) and Alltel Communications, Incorporated (ACI) to Approve the Transfer of ACI’s Authority to Provide Local Exchange Services to AHCSI, Grant AHCSI Certification to Provide Long Distance Services in South Carolina*, Order No. 2006-186 in Docket No. 2005-399-C at p. 9, ¶1 (March 28, 2006)(“the Alltel Transfer Order”).

<sup>9</sup> See Emergency Motion at 5 (“granting AT&T South Carolina’s Emergency Petition will prejudice neither: (1) ACI’s ability to ask the Commission to

## II. DISCUSSION

We find that when AT&T South Carolina signed the amendment, it mistakenly believed that ACI remained a certificated CLEC in South Carolina.<sup>10</sup> We further find that when AT&T South Carolina signed the amendment, ACI knew that it was not a certificated CLEC in South Carolina.<sup>11</sup> Accordingly, this proceeding involves a unilateral mistake of fact, and we find that but for this unilateral mistake of fact, AT&T South Carolina would not have signed the amendment.<sup>12</sup>

The issue before the Commission, therefore, is whether this unilateral mistake of fact entitles AT&T South Carolina to rescission of the amendment.<sup>13</sup> In *State Farm Mutual Auto. Ins. Co. v. Turner*, 399 S.E.2d 22, 23 (S.C. Ct. App. 1990), the Court explained that:

South Carolina law allows for a contract to be rescinded for a unilateral mistake when that mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission, or when the mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.

Applying these legal principles to the evidence in the record, we find that AT&T South Carolina is entitled to rescission of the amendment.

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allow it to continue operating under the same terms and conditions as set forth in the original interconnection agreement; nor (2) AT&T South Carolina's ability to oppose that request.").

<sup>10</sup> See Ham Verified Testimony at 3

<sup>11</sup> See Affidavit of Charles Cleary at p.2, ¶8.

<sup>12</sup> See Ham Verified Testimony at 8-9.

<sup>13</sup> South Carolina courts have explained that rescission is "an abrogation or undoing of [the amendment] from the beginning, which seeks to create a situation the same as if no [amendment] ever had existed." *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 494 (S.C. Ct. App. 2004).

In 2006, Alltel Corporation embarked on a separation of its wireless and wireline businesses.<sup>14</sup> On August 22, 2006, AT&T South Carolina (then BellSouth) sent ACI an email asking whether “in BellSouth territory, the two Alltel entities still have the same legal association as represented in the [original] interconnection agreement.”<sup>15</sup> On August 30, 2006, ACI responded that “[ACI] has retained its CLEC certificates” and “Windstream has obtained its own (separate) CLEC certificates.”<sup>16</sup> This statement was inaccurate at the time it was made,<sup>17</sup> and AT&T South Carolina relied on this statement in executing the amendment.<sup>18</sup> We find that this statement constitutes a misrepresentation by ACI that induced AT&T South Carolina’s unilateral mistake of fact.<sup>19</sup>

We further find that AT&T’s unilateral mistake of fact was induced by concealment by ACI. In April 2007, AT&T South Carolina sent another email to ACI which states, in part, “[f]rom discussions in 2006 with [ACI] it is our understanding that

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<sup>14</sup> See, e.g. Alltel Transfer Order at 2.

<sup>15</sup> See Ham Verified Testimony at p. 4; Exhibit RJH-3.

<sup>16</sup> *Id.*

<sup>17</sup> Five months earlier, in March 2006, the Commission entered an Order providing, in part, that “ACI’s Certificate to provide local exchange services shall be transferred to AHCSI [an affiliated entity].” See Alltel Transfer Order at p. 9, ¶1 (emphasis added). In July 2006, the Commission entered an Order providing that AHCSI’s name “shall be changed to Windstream Communications, Inc.,” see Order Approving Name Changes, Order No. 2006-429 in Docket Nos. 2005-399-C and 2006-146-C at p. 2 (July 24, 2006), and on August 8, 2007, Windstream Communications, Inc. filed a “CLEC Tariff” in accordance with that Order. The cover letter accompanying Windstream Communications’ CLEC Tariff filing states that the “filing cancels the [ACI] CLEC Tariff.” See Ham Verified Testimony, Exhibit RJH-5. As of August 30, 2006, therefore, ACI did not have a CLEC certificate in South Carolina, and it had withdrawn its CLEC tariff in South Carolina.

<sup>18</sup> See Ham Verified Testimony at pp. 3-4; 8-9.

<sup>19</sup> As there is no evidence to suggest that this inaccurate statement was the result of anything other than a good-faith mistake by ACI, we find that this misstatement constitutes misrepresentation, but not fraud or deceit.

ACI has retained some CLEC licenses in the AT&T Southeast region . . . .”<sup>20</sup> Despite AT&T South Carolina’s obvious and continued reliance on ACI’s prior inaccurate statement, nothing in the record suggests that ACI did anything to correct that inaccurate statement. Moreover, in August 2007, AT&T South Carolina sent ACI correspondence stating that “[ACI] must furnish proof of its CLEC certification in all states requested” in order for AT&T South Carolina to execute the amendment.<sup>21</sup> ACI’s witness testified that ACI “no longer had a CLEC certification for the State of South Carolina” at that time and that “I did not furnish any such CLEC certification to AT&T nor did I represent in any way that Alltel had ongoing CLEC operations with South Carolina . . . .”<sup>22</sup> Nothing in the record, however, suggests that ACI informed AT&T South Carolina that it did not have a CLEC certificate at that time. We find that in light of ACI’s prior inaccurate statement to AT&T South Carolina and ACI’s failure to comply with the notice requirements of Section 9.2 of the interconnection agreement (which is addressed below), ACI’s failure on these two occasions to inform AT&T South Carolina that ACI did not have a CLEC certificate constitutes a concealment that induced AT&T South Carolina’s unilateral mistake of fact.

Finally, we find that declining to rescind the amendment would deprive AT&T South Carolina of the opportunity to present arguments as to why this interconnection agreement should not be extended,<sup>23</sup> and we find that it would be inequitable for AT&T

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<sup>20</sup> See Exhibit 1 to Affidavit of Charles Cleary.

<sup>21</sup> See Affidavit of Charles Cleary at p. 2, ¶8; Exhibit 3 to Cleary Affidavit.

<sup>22</sup> See Affidavit of Charles Cleary at p. 2, ¶8.

<sup>23</sup> We note that AT&T South Carolina recently has presented arguments as to why entities that are not certificated to provide wireline services should not be allowed to adopt an interconnection agreement that addresses both wireless and wireline services. See, e.g., Brief of AT&T South Carolina in Consolidated Dockets 2007-255-C and 2007-256-C (“the Nextel adoption dockets”). Accordingly, we find AT&T South Carolina’s

South Carolina to be deprived of that opportunity because of ACI's inaccurate statement. Moreover, given the adoption provisions of Section 252(i) of the federal Telecommunications Act, declining to rescind that amendment potentially could extend this inequity well beyond this single dispute between AT&T and ACI. Accordingly, we find that AT&T South Carolina is entitled to rescission of the amendment because its unilateral mistake of fact is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the amendment.

ACI suggests that AT&T South Carolina is not entitled to rescission of the amendment because it was negligent in that it should have known of the Commission's Order transferring ACI's CLEC certificate to an affiliated entity.<sup>24</sup> We disagree. Section 9.2 of the General Terms and Conditions of the interconnection agreement provides that if ACI "changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of [ACI] to notify [AT&T South Carolina] of said change . . . ." AT&T's witness, who personally participated in the negotiations that led to the inclusion of this language in the interconnection agreement, testified that

Rather than trying to keep track of such changes by indirect means (such as by monitoring press announcements or regulatory filings), AT&T South Carolina wanted ACI to notify AT&T South Carolina directly of any such changes, and ACI agreed to contractual language requiring it to do so.<sup>25</sup>

We find that it was not negligent for AT&T not to have monitored the regulatory proceedings before this Commission for indicia of changes in ACI's corporate structure or name when ACI contractually obligated itself to directly notify AT&T South Carolina

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testimony that it would not have signed the amendment if it had known ACI was no longer a certificated CLEC to be credible. *See* Ham Verified Testimony at 8-9.

<sup>24</sup> Response at 5-7.

<sup>25</sup> Ham Verified Testimony at 7.



of such changes. We further find that no such notification was provided by ACI,<sup>26</sup> and that had ACI provided such notification as required by the terms of the interconnection agreement, AT&T South Carolina would not have signed the amendment.<sup>27</sup>

ACI, however, argues that the transactions addressed in the Alltel Transfer Order did not trigger these notice provisions because ACI did not change its corporate structure – it “simply transferred all its CLEC-related assets to what is now known as Windstream . . . .”<sup>28</sup> We disagree. We find that the transfer of all of ACI’s CLEC-related assets to an affiliated entity is a change to company structure as contemplated by the notice provisions of Section 9.2 of the interconnection agreement. This finding is supported by ACI’s own submissions in Docket No. 2005-399-C, which are replete with language such as “transfer of business,”<sup>29</sup> “transfer of ACI’s authority to provide local exchange services to AHCSI,”<sup>30</sup> “the transfer of local exchange and long distance resale customers from ACI to AHCSI,”<sup>31</sup> and “the separation of the wireless and wireline businesses of Alltel Corporation.”<sup>32</sup> Nor do we agree with ACI’s argument that Docket No. 2005-399-C did not involve a change in name or identity as contemplated by Section 9.2 of the interconnection agreement.<sup>33</sup> ACI’s own submissions in that docket state that “[t]he only change apparent to customers will be in the change of the name of the customers’ service provider,”<sup>34</sup> and our Order in that docket provides that “the local exchange and long

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<sup>26</sup> Ham Verified Testimony at 8.

<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> ACI’s Response at 5.

<sup>29</sup> Joint Application in Docket No. 2005-399-C at 1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 3.

<sup>33</sup> ACI’s Response at 5, n.5.

<sup>34</sup> Joint Application in Docket No. 2005-399-C at 2.

distance resale business of [ACI] will be transferred to and become a part of the new wireline business and a new name will be adopted.”<sup>35</sup>

ACI further argues that AT&T South Carolina has waived its right to object to the amendment because it executed the amendment without requiring ACI to submit CLEC certificates for South Carolina.<sup>36</sup> We disagree. Under South Carolina law, “[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right,”<sup>37</sup> and it requires “a party to have known of a right, and known that the party was abandoning that right.”<sup>38</sup> We find that AT&T did not know that ACI did not have a CLEC certificate in South Carolina – to the contrary, AT&T South Carolina had ample reason (including ACI’s misstatement, ACI’s failure to correct its misstatement, and ACI’s failure to comply with its contractual notice obligations) to believe that ACI had a CLEC certificate when it signed the amendment. AT&T South Carolina, therefore, did not voluntarily abandon any known rights.

ACI argues rescission of the amendment is not appropriate because certain Merger Commitments require AT&T South Carolina to execute the amendment.<sup>39</sup> As we did in the AT&T South Carolina – Sprint arbitration proceedings, we find that we have concurrent jurisdiction with the FCC to enforce these merger commitments, but we

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<sup>35</sup> Alltel Transfer Order at 2.

<sup>36</sup> Alltel Response at 7-8.

<sup>37</sup> *Parker v. Parker*, 443 S.E.2d 388, 391 (S.C. 1994).

<sup>38</sup> *Strickland v. Strickland*, 650 S.E.2d 465, 470-71 (S.C. 2007).

<sup>39</sup> ACI Response at 2-3. The FCC’s Order approving the merger of AT&T Inc. and BellSouth Corporation contains, as Appendix F, a number of commitments the FCC considered in approving the merger. See Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)(“Merger Order”).

decline to exercise that concurrent jurisdiction in this docket.<sup>40</sup> Unlike the FCC’s Orders that address Section 251 requirements, the FCC’s *Merger Order* does not provide overarching guidance to be applied by the states. Instead, the *Merger Order* adopts specific “conditions and commitments” that are “enforceable by the FCC . . . .”<sup>41</sup> We can discern no legal or policy reason that any of these specific conditions and commitments should be interpreted to mean one thing in one state and other things in other states. We believe that judicial economy, uniformity, and certainty are all best served by letting the FCC decide if the Merger Commitments upon which ACI relies require AT&T South Carolina to extend the interconnection agreement, and our decision to rescind the amendment does nothing to prejudice ACI’s ability to ask the FCC to decide that question.

Finally, ACI argues that the interconnection agreement does not require it to maintain a CLEC certificate.<sup>42</sup> As noted above, our decision to rescind the amendment does not prejudice ACI’s ability to present this argument in the future, should it choose to do so. We note, however, that the interconnection agreement contains several provisions that arguably are inconsistent with ACI’s position. The first page of the interconnection agreement, for example, states that ACI “is a Competitive Local Exchange Carrier (“CLEC”) authorized to provide telecommunications services in the state[] of . . . South Carolina” and that ACI “is both a CLEC and a CMRS provider and the services are provisioned pursuant to this regional Agreement to [ACI] for both its CLEC and CMRS businesses . . . .” This is not the case today. Additionally, the interconnection agreement

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<sup>40</sup> See Order Ruling on Arbitration, *In Re: Petition of Sprint Communications Co. L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast*, Order no. 2007-683 in Docket No. 2007-215-C (October 5, 2007).

<sup>41</sup> *Merger Order* (Appendix F), p. 147 (emphasis added).

<sup>42</sup> Alltel Response at 3-5.

provides that the parties' "agreement to establish a bill and keep compensation arrangement was based upon . . . consideration of the balance of traffic anticipated and experienced" and provides that the bill and keep provision "shall be limited in applicability solely to the specific circumstances and Parties to this Agreement."<sup>43</sup> We note that our decision to rescind the amendment does not prejudice the rights of ACI or AT&T South Carolina to argue in the future that the interconnection agreement does or does not require ACI to maintain a CLEC certificate. In light of these provisions and the limited record before us, however, we decline to decide that issue at this time.

### CONCLUSION

Based on the foregoing, it is hereby ordered that:

1. AT&T South Carolina's Emergency Motion for Order Acknowledging Withdrawal of Amendment to Interconnection Agreement is granted;
2. The amendment submitted to the Commission by letter dated February 28, 2008 is rescinded;

This Order shall remain in full force and effect until further Order of the Commission.

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<sup>43</sup> Interconnection Agreement, General Terms and Conditions §§3.1, 3.2

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

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G. O'Neal Hamilton, Chairman

ATTEST:

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C. Robert Moseley, Vice Chairman

(SEAL)

Respectfully submitted on this the 16th day of June, 2008.

BELLSOUTH TELECOMMUNICATIONS, INC.,  
d/b/a AT&T SOUTH CAROLINA



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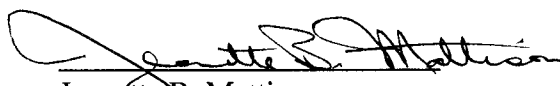
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Jeanette B. Mattison

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